

A Preference for Domestic Water Use in Utah: A Relic of the Past?

**By
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Since 1880, sixteen years prior to statehood, Utah law has given preference, in times of scarcity, to “domestic use”—historically defined as indoor household use—over all other uses of water. 1880, Laws of Utah, Chapter XX, Section 14. This policy derives from the truism that the absence of drinking water renders any other potential use completely pointless, since there would be no one to benefit from it. Utah law has thus maintained the primacy of household water use, for drinking, kitchen, and sanitary purposes among all of the many beneficial uses of water for well over a century. Utah’s 2009 Legislature caught many a bit off guard, therefore, when H.B. 241 repealed Utah Code Ann §73-3-21, the statute that gives priority to domestic use of water. It was only at the last minute that the effective date of the repeal was delayed until May 12, 2010, to provide an opportunity for closer scrutiny.

Utah, like many other western states, generally follows the time-honored Doctrine of Prior Appropriation, generally summarized as “first in time is first in right.” Prior appropriation gives an earlier, or prior appropriator of water (called the senior appropriator), the right to take and use its entire water right before a later, or subsequent appropriator (called the junior appropriator), may take any water pursuant to its right. *See* UCA § 73-3-1. The just-repealed exception to strict application of the Prior Appropriation Doctrine has always been a statutory safety valve, allowing for domestic water use otherwise unavailable during times of scarcity:

Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right; provided, in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use.

See UCA § 73-3-21.

The statutory preference for domestic use has had several incarnations since 1880, but it had remained unchanged since 1917 when it was prospectively repealed in 2009; and, while few could recall when it had last been formally invoked, the move to repeal the preference for domestic use was led by Utah’s agricultural community and its principal lobby, the Utah Farm Bureau. Ironically, the repealed law gave agricultural water use second priority to domestic use in times of scarcity. This priority will be lost under the repeal. Not surprisingly, at least one large mining interest also supported the repeal.

Proponents of the repeal successfully characterized the preference as both vague as well as contrary to the Prior Appropriation Doctrine. Those who opposed the repeal, of course, urged caution in changing a law which had existed for 131 years without any major complaint or problem. They noted that, as Utah’s population continued to grow, the State’s limited supply of water must, of necessity, eventually be subject to the application of the preference during times of scarcity so as to ensure that public water suppliers could continue uninterrupted culinary water service. The fact that Utah, next only to Nevada,

is the driest state in the nation makes this point all the more critical, especially in that, in Utah, water rights for culinary use, which necessarily includes domestic use, are often junior to agricultural water rights drawn from the same source or aquifer.

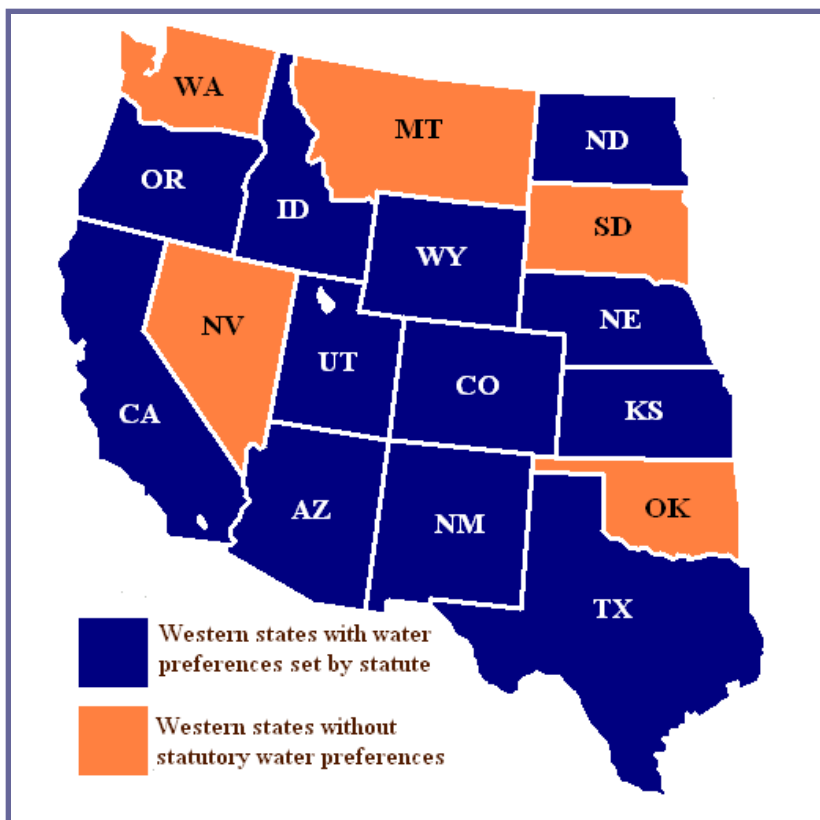
The preference has been a useful tool for public water suppliers even despite its rare formal application. One municipal public water supplier, for example, had a well which, when pumped, directly diminished flows from a nearby spring. The spring provided water for agricultural use under a water right senior to that of the municipality who owned the well. Due to this recognized interference, the municipality used the well only as an emergency backup. However, several times, when other sources were not available—typically during the late summer months—the well was pumped, and the public water supplier negotiated a voluntary damage payment to the senior water right holder for crop loss. Without the now perhaps-defunct preference, the senior water right holder could have successfully refused to accept damages and instead enforced his senior water right and required the public water supplier to suspend pumping the well, taking culinary water from thirsty people to irrigate crops.

Obviously, leaving occupied homes without domestic water is an unacceptable outcome. Equally obviously, were it ever to occur, there would be an immediate and intense public outcry demanding the legislature reinstate a domestic-over-other-use preference. Even faced with this thirsty specter, the proponents of the repeal pressed forward, many doubting that any such scenario could ever really occur.

One point both sides did agree upon was that the language of the law was outdated and did not address modern multiple uses of water by public water suppliers typically bundled under the heading “municipal use.” This is unsurprising since public suppliers with “municipal” water rights can legally use water for numerous purposes (and typically do), from snow making in the ski resort of Park City to watering golf courses, year round, in St. George, in addition to the regular domestic use of local residents. Attempting to parse “municipal” water usage so as to separate domestic water use from all other uses is problematic, to say the least, for most public water suppliers. They could and have, however, adopted policies and ordinances limiting outside watering during periods of low supply.

Both sides also noted that, until 1903, the law provided for just compensation to senior water-right holders whose priority was lost through legal process. The original 1880 statute providing that

Whenever the waters of any natural source of supply are not sufficient for the service of all those having primary rights to the use of the same, such water shall be distributed to



each owner of such right in proportion to its extent, but those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for irrigating lands shall have preference over those using the same for any other purpose, except domestic purposes. Provided, Such preference shall not be exercised to the injury of any vested right, without just compensation for such injury.”

1880, Laws of Utah, Chapter XX, Section 14. Many, both for and against the repeal, felt that just compensation should also apply if domestic-preference trumps the usual operation of the Prior Appropriation Doctrine to provide water for domestic use. In the example above, the payment of compensation for crop loss allowed the parties to negotiate an amicable resolution outside of court. If the preference is resurrected in the 2010 legislative session it will almost assuredly include a provision for payment of just compensation to the senior water right holder.

The hierarchy of beneficial water use is not unique to Utah; prior appropriation statutes generally include some form of preference that can preempt a prior or senior use of water. These preferences range from the curiously blurry—Washington’s remarkably vague declaration that water allocation “among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state,” RCW § 90.54.020—to the strictly regimented—Texas law’s specific, categorical list of appropriation preferences, Texas Water Code Annotated § 11.024. The particulars are set out in the table below:

<p>ARIZONA Rev. Stat. Ann. § 45-157</p>	<p>Specifies the “Relative value of uses” when “the capacity of the [water] supply is not sufficient for all applications” as follows:</p> <ol style="list-style-type: none"> 1. Domestic and municipal uses. Domestic uses shall include gardens not exceeding one-half acre to each family. 2. Irrigation and stock watering. 3. Power and mining uses. 4. Recreation and wildlife, including fish. 5. Nonrecoverable water storage pursuant to section 45-833.01.
<p>CALIFORNIA Calif. Water Code § 1460</p>	<p>California law does not provide a list of preferences, but does provide for the supremacy of municipal permits delivering water for domestic uses:</p> <p><i>The application for a permit by a municipality for the use of water for the municipality or the inhabitants thereof for domestic purposes shall be considered first in right, irrespective of whether it is first in time.</i></p> <p>The law also allows for temporary permits for water in excess of a municipality’s needs; however, should the municipality desire to use the additional water,</p> <p><i>it may do so upon making just compensation [to the temporary user] for the facilities for taking, conveying, and storing the additional water [Disputed] compensation ... may be determined [as if it were] property [to be] taken by eminent domain proceedings.</i></p>

COLORADO
Constitution,
Art. XVI § 6

In Colorado, the preferences in times of drought or other scarcity—domestic trumps all other uses, and agricultural use trumps manufacturing—is explicitly spelled out in the state’s Constitution:

The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

IDAHO
Constitution,
Art. XV §§ 3 & 5

In Idaho, as in Colorado (and in much the same language), preferences in times of drought or other scarcity—domestic use first, mining uses second (if in an organized mining district), agricultural use third, and manufacturing fourth—are explicitly spelled out in the state’s Constitution:

SECTION 3. *[w]hen the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have the preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.*

SECTION 5. *Whenever more than one person has settled upon, or improved land with the view of receiving water for agricultural purposes, under a sale, rental, or distribution thereof, as in the last preceding section of this article provided, as among such persons, priority in time shall give superiority of right to the use of such water in the numerical order of such settlements or improvements; but whenever the supply of such water shall not be sufficient to meet the demands of all those desiring to use the same, such priority of right shall be subject to such reasonable limitations as to the quantity of water used and times of use as the legislature, having due regard both to such priority of right and the necessities of those subsequent in time of settlement or improvement, may by law prescribe.*

KANSAS
KSA § 82a-
707(b) & (c)

Kansas operates under the Prior Appropriation Doctrine. Kansas law does include a preference list (Subsection (b)), but that list (rather strangely) applies only to conflicting *usage* of water; not to the purpose of its use:

Where uses of water for different purposes conflict, such uses shall conform to the following order of preference: [a] Domestic, [b] municipal, [c] irrigation, [d] industrial, [e] recreational and water power uses. However, the date of priority of an appropriation right, and not the

purpose of use, determines the right to divert and use water at any time when the supply is not sufficient to satisfy all water rights that attach to it. The holder of a water right for an inferior beneficial use of water shall not be deprived of the use of the water either temporarily or permanently as long as such holder is making proper use of it under the terms and conditions of such holder's water right and the laws of this state, other than through condemnation.

Because the drafters of this provision did not include a serial comma, it is not clear whether “recreational” use trumps “water power” use or not. Because lists in prior and subsequent statutory provisions do include serial commas, we have opted to assume that the two uses occupy the same level of preference.

Kansas law (Subsection (c)) includes a provision recognizing the primacy of domestic use, but it is remarkably weak, and appears to apply only at application, not later:

*The priority of the appropriation right to use water for any beneficial purpose except domestic purposes shall date from the time of the filing of the application therefor in the office of the chief engineer. The priority of the appropriation right to use water for domestic purposes shall date from the time of the filing of the application therefor in the office of the chief engineer **or from the time the user makes actual use of water for domestic purposes**, whichever is earlier.*

MONTANA
(no preference provisions)

Montana law gives no order of preference as to water use: there is no provision in the Montana Code listing or even implying the primacy or superiority of any particular water use. Montana does not even make any allowance for domestic use. Part Five of Chapter 85-2 of the Montana Code places significant importance on underground water, but all water use is subject to Montana’s application of the Prior Appropriation Doctrine, under- as well as above-ground. **Time** of beneficial use of water—and to some extent, its source—controls; **purpose** of use is virtually irrelevant.

NEBRASKA
State
Constitution,
Art. XV § 6

Nebraska’s preference hierarchy appears in its Constitution, which lists them as follows:

Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

NEVADA
(no preference provisions—excepting one for irrigation using

Oddly perhaps, for the driest state in the U.S., Nevada law contains a rather rudimentary set of preference provisions for underground water in the context of irrigation, but none for any other use or source. (On the other hand, because it is so dry, Nevada has very little above-ground water requiring regulation):

When two or more applications are made to appropriate underground

underground
water)

water for irrigation purposes from what appears to the State Engineer to be the same basin he shall observe the following order of priority in acting upon them, according to the status of the applicant and the intended place of use:

1. An owner of land for use on that land.
2. An owner of land for use on adjacent land for which he intends to file an application under the Carey Act or the Desert Land Entry Act, 43 U.S.C. §§ 321 et seq.
3. Any other person whose application is preparatory to proceeding under the Carey Act or the Desert Land Entry Act.

NEW MEXICO
NM Stat. Ann.
§ 73-14-47(I)

In New Mexico, beneficial use is considered the equivalent of a formal application, and preference is given according to purpose of use:

*[An] application shall state the purposes and character of [the planned] use, the period and degree of continuity of [the] use, the amount of water desired and the place of use. **In case any party makes greater, better or more convenient use of the waters of the district without formal application, the fact of such use shall serve all purposes of an application, and the board may proceed to determine a reasonable rate of compensation the same as though formal application has been made.** Where it is not possible or reasonable to grant all applications, **preference shall be given to the greatest need and to the most reasonable use,** as may be determined by the board, subject to the approval of the court. **Preference shall be given, FIRST, to domestic and municipal water supply,** and no charge shall be made for the use of water taken by private persons for home and farmyard use, or for watering farm stock; **SECOND, to supplying water used in irrigation, processes of manufacture, for the production of steam, for refrigerating, cooling and condensing and for maintaining sanitary conditions of stream flow; THIRD, for power development, recreation, fisheries and for other uses.***

(Emphasis added.)

NORTH DAKOTA
ND Century
Code
§ 61-04-06.1

Applies to “competing applications for water from the same source” when “the source is insufficient to supply all applicants.” Preference priority runs as follows:

1. Domestic use.
2. Municipal use.
3. Livestock use.
4. Irrigation use.
5. Industrial use.
6. Fish, wildlife, and other outdoor recreational uses.

OKLAHOMA
(no preference provisions—
although the language implies the primacy of domestic use)

Oklahoma water law has an interesting, if rather convoluted, history. Oklahoma is essentially a 45-million-acre plain sloping from high, semi-arid prairie in the west to a comparatively lush humid subtropical land in the east where the Canadian, Arkansas, and Red Rivers enter the state of Arkansas on their way to the Gulf of Mexico. This split climatic personality led, awkwardly, to Oklahoma's employing at times **both** the Prior Appropriation **and** Riparian Ownership Doctrines.

In 1993, however, the Oklahoma legislature passed SB 54 (Oklahoma Laws chapter 310 § 1), codified at OSC § 82-1-105.1A, the purpose of which was

to provide for stability and certainty in water rights by replacing the incompatible dual systems of riparian and appropriative water rights ... with an appropriation system ... requiring the beneficial use of water and providing that priority in time shall give the better right. These sections are intended to provide that riparian landowners may use water for domestic uses and store water in definite streams and that appropriations shall not interfere with such domestic uses, to recognize through administrative adjudications all uses, riparian and appropriative, existing prior to June 10, 1963, and to extinguish future claims to use water, except for domestic use, based only on ownership of riparian lands.

OREGON
ORS § 536.310

Oregon's lawmakers have crafted an admirable water-use-priority hierarchy, emphasizing the establishment, protection, and preservation of both water duties and relative priorities (Subsection (1)):

When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to [a] human consumption purposes over all other uses and [b] for livestock consumption, over any other use, and thereafter [c] other beneficial purposes in such order as may be in the public interest ... under the existing circumstances

(Subsection 12). The Oregon provision reiterates the priority of domestic water use in Subsection 3 of the same provision: "[A]dequate and safe [water] supplies [shall] be preserved and protected for human consumption, while conserving maximum supplies for other beneficial use." Oregon, moreover, discourages "[c]ompetitive exploitation of water resources ... for single-purpose uses ... when other feasible uses are in the general public interest" (Subsection 5).

Having made provision for its citizens' health and industry, Oregon law goes on to specify order of preference in other areas:

- Multiple-purpose impoundment structures are to be preferred over single-purpose structures;
- Upstream impoundments are to be preferred over downstream impoundments;
- Planning and construction of impoundment and other artificial obstructions must give due regard to the protection of Oregon's fishing industry.

(See Subsection 4.) Finally, Oregon law addresses environmental considerations:

The maintenance of minimum perennial streamflows sufficient to support aquatic life, to minimize pollution and to maintain recreation values shall be fostered and encouraged if existing rights and priorities under existing laws will permit

(Subsection 7.)

SOUTH DAKOTA
SD Codified
Law § 46-1-5

Specifies that domestic water use is “the highest use of water and takes precedence over all appropriative rights,” so long as it is “exercised in a manner consistent with [the] public interest.” South Dakota law, however, provides no list of preferences such as exist in other state codes.

TEXAS
Texas Water
Code Ann. §
11.024

Operates “to conserve and properly utilize state water,” by declaring the state’s “constructive public policy regarding the preferences between these [beneficial] uses”: “[I]t is therefore declared to be [Texas] public policy ... that in appropriating state water preference shall be given to the following uses in the order named:”

(1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals ... shall be and remain superior to the rights of the state to appropriate the same for all other purposes;

(2) agricultural uses and industrial uses;

(3) mining and recovery of minerals;

(4) hydroelectric power;

(5) navigation;

(6) recreation and pleasure; and

(7) other beneficial uses.

[Note: *oddly, the Texas Code does not cite this hierarchy in its provisions about water shortages (Texas Water Code § 11.039), stating instead that water must be shared pro rata “so that preference is given to no one and everyone suffers alike.”]*

UTAH
UCA § 73-3-21

[Repeal effective May 12, 2010]

Appropriators shall have priority among themselves according to the dates of their respective appropriations, so that each appropriator shall be entitled to receive his whole supply before any subsequent appropriator shall have any right; provided, in times of scarcity, while priority of appropriation shall give the better right as between those using water for the same purpose, the use for domestic purposes, without unnecessary waste, shall have preference over use for all other purposes, and use for agricultural purposes shall have preference over use for any other purpose except domestic use.

WASHINGTON
Wash. Rev.
Code Ann. §
90.54.020(1) &
(2)

Declares “beneficial” water use for “domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, ... thermal power production purposes, ... preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state” But mentions no priorities, instead providing only that

Allocation of waters among potential uses and users shall be based generally on the securing of the maximum net benefits for the people of the state. Maximum net benefits shall constitute total benefits less costs including opportunities lost.

WYOMING
Wyo. Stat. Ann.
§ 43-3-102(b)

41-3-102. Preferred uses; defined; order of preference.

(b) Preferred water uses shall have preference rights in the following order:

(i) Water for drinking purposes for both man and beast;

(ii) Water for municipal purposes;

(iii) Water for the use of steam engines and for general railway use, water for culinary, laundry, bathing, refrigerating (including the manufacture of ice), for steam and hot water heating plants, and steam power plants; and

(iv) Industrial purposes.

[**Note:** § 41-3-102(a) allows for the condemnation of “preferred water uses,” but curiously also declares that

[t]he use of water for irrigation shall be superior and preferred to any use where water turbines or impulse water wheels are installed for power purposes; provided, however, that the preferred use of steam power plants and industrial purposes herein granted shall not be construed to give the right of condemnation.]

The reasons for the repeal are likely a reaction by the agricultural community to urbanization caused by Utah’s rapid population growth which has both shifted water from agriculture to municipal use and dramatically increased water right values. Between 1980 and 2007, Utah growth has experienced a double-digit increase, averaging an annual 22% increase over the 27-year period. *See* Table 13, Population: Estimates and Projections – States, Metropolitan Areas, Cities, The 2009 Statistical Abstract, The National Date Book, available on the U.S. Census website, www.census.gov. The spark was likely legislation in 2008 that was viewed by the agricultural community as largely favorable to public water suppliers and urban areas. A key provision of the 2008 legislation was to allow public water suppliers to hold water rights for the “reasonable future requirements of the public” without forfeiture for nonuse. However if the history of water development in the west teaches us anything, it is that water will always continue to flow, both literally and economically, to the demands of domestic and other urban uses.